Supreme Court, U. S.
FILED
JUN 21 1975
MICHAEL RODAK, JR., CLERK

(F-62)

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1622

WILLIAM E. KIRWAN, Superintendent of the New York State Police,

Appellant,

vs.

DONALD F. ROMANO,

Appellee.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellant
65 Court Street
Buffalo, New York 14202

RUTH KESSLER TOCH
Solicitor General

DOUGLAS S. CREAM
Assistant Attorney General

of Counsel

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-3457

INDEX.

	Page
Jurisdictional Statement	1
The Opinion Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	4
Questions Presented	5
Statement of the Case	6
The Questions Presented are of Substantial Constitutional Importance	8
I. The State Police may constitutionally regulate the personal appearance of its officers upon the legitimate state interests of safety and efficiency	8
II. The approval of the regulation by appellee's collective bargaining agent waived such constitutional rights as appellee may have had	13
Conclusion	15
Appendix A:	
Notice of Entry of Judgment of March 6, 1975	1a
Judgment Dated March 6, 1975 Over the Signature of John K. Adams, Clerk	2a
Notice of Entry of an Order Dated March 4, 1975, Entered March 6, 1975	3a
Order of Three Judge Court Dated March 4, 1975, Together With Footnotes Thereto	5a
Dissenting Opinion of the Hon. Harold P. Burke, Dated March 3, 1975	15a
Amendment Fourteen of the United States Constitution Section 1	16a

Page

Appendix B:
Designation of Judges Dated April 30, 1974 ..... 17a
Notice of Entry of Order Dated April 24, 1974 .... 18a
Order Dated April 24, 1974 by the Hon. John T. Curtin 19a

Appendix C:
Notice of Appeal to the Supreme Court of the United States 22a

TABLE OF CASES.

Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L.Ed. 2d 112 (1971) 14
D. H. Overmyer Co., Inc. of Ohio v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L.Ed. 2d 124 (1972) 13, 14
Dwen v. Barry, 336 F. Supp. 487 (E.D.N.Y. 1973) ... 3, 4
Dwen v. Barry, 483 F. 2d 1126 (2d Cir. 1973) ..3, 4, 9, 13
Dwen v. Barry, No. 71 C 1020 (E.D.N.Y. 5/30/74) ... 4
Dwen v. Barry, ... F. 2d .... (2d Cir. 1974), cert. granted Docket No. 74-1269 (May 27, 1975) 4, 11
Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 80 S. Ct. 568, 4 L.Ed. 2d 568 (1960)..... 4
Greenwald v. Frank, 32 N.Y. 2d 862, 346 N.Y.S. 2d 529 (1973) 10, 11
Greenwald v. Frank, 70 Misc. 2d 632, 334 N.Y.S. 2d 680, judgment aff'd as modified 40 A.D. 2d 717, 346 N.Y.S. 2d 529 (1973) 10
Griswold v. Connecticut, 381 U.S. 506, 85 S. Ct. 1678, 14 L.Ed. 2d 510 (1965) 12
Michini v. Rizzo, 379 F. Supp. 837 (E.D. Penna. 1974) 11
National Equipment Rental, Ltd. v. Szuklent, 375 U.S. 311, 84 S. Ct. 411, 11 L.Ed. 2d 354 (1964) 13, 14
N.L.R.B. v. Magnavox, ... U.S. ...., 94 S. Ct. 1099 (1974) 14

Page

Ohio Bell Tel. Co. v. Public Utilities Comm'n., 301 U.S. 292, 307, 57 S. Ct. 724, 731, 81 L.Ed. 1093 (1937) . 13
Richards v. Thurston, 424 F. 2d 1281 (1st Cir. 1970) 12, 13
Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed. 2d 147 (1973) 4
Stradley v. Anderson, 349 F. Supp. 1120 (D. Nebraska 1972)..... 9
Stradley v. Anderson, 478 F. 2d 188 (8th Cir. 1973) 9, 11, 13
Swift & Company v. Wickham, 382 U.S. 111, 86 S. Ct. 258 (1965) 4
Textile Worker's v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912, 1 L.Ed. 2d 972 (1957) 14
White v. Regester, 412 U.S. 755, 93 S. Ct. 2332, 37 L.Ed. 2d 314 (1973) 4

STATUTES AND CONSTITUTIONAL PROVISIONS.

28 U.S.C. § 1253 ..... 3, 4
28 U.S.C. § 1331(a) 2
28 U.S.C. § 1343(3) 2
28 U.S.C. § 2281 .....2, 3, 4, 7
28 U.S.C. § 2284.....2, 4, 7
42 U.S.C. § 1983..... 3
New York State Executive Law § 215(3) .....
Part III, Article IV, § 4.18 New York State Police Manual 1, 4, 6, 8, 13

IN THE

Supreme Court of the United States

October Term, 1974

No. .....

WILLIAM E. KIRWAN, Superintendent of the New York State Police,

Appellant,

vs.

DONALD F. ROMANO,

Appellee.

Appeal from a Three Judge Court of the United States District Court for the Western District of New York.

Jurisdictional Statement

This is an appeal from a declaratory judgment and injunction entered on March 6, 1975 by a three judge District Court for the Western District of New York. That Court declared Part III, Article IV, § 4.18 of the New York State Police Manual[1] to be unconstitutional as violative of the Due Process

[1] This regulation specifies the length which New York State Troopers may grow their hair, mustaches and sideburns.

Clause of the Fourteenth Amendment. The Court entered a permanent injunction restraining the enforcement of that regulation.

The Opinion Below

The decision, order and judgment of the United States District Court for the Western District of New York from which this appeal is taken is unreported. A copy of the decision, order and judgment is printed in Appendix A, *infra*, pp. 2a-14a.[2]

Jurisdiction

This appeal is from the final judgment and order of the United States District Court for the Western District of New York sitting as a three judge court pursuant to Title 28 of United States Code, § § 2281 and 2284.

The proceeding was brought by appellee under 28 United States Code § § 1331(a) and 1343(3) based upon a cause of action arising under Title 42 of United States Code § 1983.

Appellee sought the declaration of unconstitutionality and the enjoining of the enforcement of certain regulations of the State of New York.

The decision and order of the United States District Court for the Western District of New York was dated March 4, 1975 and entered on the 6th day of March, 1975 in the office of the Clerk of the United States District Court for the Western District of New York.

The Notice of Appeal was filed on the 23rd day of April, 1975 in the office of the Clerk of the United States District

[2] The Honorable Harold P. Burke, District Judge, dissented in a separate opinion printed in Appendix A, *infra*, pp. 15a-16a.

Court for the Western District of New York. A copy of the Notice of Appeal is printed as Appendix C, *infra*, p. 21a.

The jurisdiction of the Supreme Court to review the judgment of the three judge District Court is grounded upon Title 28, U.S.C. § 1253.

The District Court entered a permanent injunction restraining appellant, upon constitutional grounds, from the statewide enforcement of a regulation promulgated by a state agency pursuant to statutory authority.

The regulation held unconstitutional by the District Court was promulgated by appellant, who has been sued in the instant action in his official capacity as the Superintendent of the New York State Police. Statutory authority for the promulgation of the regulation is found in § 215(3) of the Executive Law of the State of New York.[3]

The District Court, following briefing and argument on the issue of the necessity for convening a three judge court held that the requirements of 28 U.S.C. § 2281 had been met. The Court relying on *Dwen* v. *Barry*, 483 F. 2d 1126 (2d Cir. 1973), held that a substantial constitutional question had been presented.[4] That order is printed in Appendix B, *infra*, p. 19a.

[3] THE EXECUTIVE LAW

§ 215. Organization; salaries; qualifications; appointment; term; rules and regulations.

3. [T]he superintendent shall make rules and regulations subject to approval by the governor for the discipline and control of the New York State Police * * *. (18 McKinney's Consolidated Laws of New York Annotated 209).

[4] This case began in the United States District Court, Eastern District of New York, wherein summary judgment was granted defendant Police Chief of Suffolk County, New York State, dismissing the complaint challenging a regulation of the Suffolk County Police Department almost identical to the regulation of the New York State Police. *Dwen* v. *Barry*, 336 F. Supp. 487

(Footnote continued on following page)

The Court of Appeals, for the Second Circuit, having held in *Dwen* that an attack upon a rule regulating the hair length of police officers raised a substantial constitutional question foreclosed the District Court in the instant case, which court is in the Second Circuit from holding otherwise.

The issues raised by this case, and the relief demanded by appellee, together with the Court of Appeals holding in *Dwen* required the convening of the three judge District Court pursuant to 28 U.S.C. § § 2281 and 2284. *Swift & Company* v. *Wickham*, 382 U.S. 111, 86 S.Ct. 258, (1965); *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 80 S.Ct. 568, 4 L. Ed. 2d 568 (1960).

The District Court, having properly been convened as a three judge District Court to hear and determine the substantial constitutional issues raised, jurisdiction to review the declaratory and injunctive relief granted by that Court is conferred upon this Court by 28 U.S.C. § 1253. *White* v. *Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L. Ed. 2d 314 (1973); *Roe* v. *Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

Constitutional and Statutory Provisions Involved

Part III New York State Police Manual Article IV
Section 4.18 Personal Appearance:

"All members, both Uniform and Bureau of Criminal Investigation, shall adhere to these guidelines and

(Footnote continued from preceding page)

(E.D.N.Y. 1973). That decision was reversed and the case remanded for trial. *Dwen* v. *Barry*, 483 F. 2d 1126 (2d Cir., 1973). Following a plenary hearing in the District Court, judgment was granted in favor of plaintiff, declaring the regulation unconstitutional and enjoining its enforcement. *Dwen* v. *Barry*, ... F. Supp. .... (E.D.N.Y., 1974). That decision was affirmed without opinion, *Dwen* v. *Barry*, ... F. 2d .... (2d Cir. 1974), cert. granted Docket No. 74-1269 (May 27, 1975). The case has not yet been heard by this Court.

criteria. Members may be excluded from these limitations by Troop or Detail Commanders when special assignments require deviation.

a. Hair will be neatly groomed and tapered and will not fall over the ears or eyebrows or touch the collar except for the closely cut hair at the back of the neck. The bulk or length of hair will not interfere with the normal wearing of all emergency or Division headgear.

b. Sideburns will be neatly trimmed and will not be of the muttonchop or flared type. The base of the sideburns will be clean-shaven on a horizontal line and shall not extend below the lowest part of the exterior ear opening.

c. The face will be clean-shaven except that mustaches will be permitted. If worn, mustaches will be kept neatly trimmed and shall not extend beyond the corners of the mouth nor fall below the center line of the lips".

The constitutional provision involved is the Constitution of the United States, Amendment XIV, Section 1, U.S.C.A. Const. Amend. XIV, Section 1. The section is printed in Appendix A, *infra*, p. 16a.

Questions Presented

1. At a hearing held before a member of the three judge District Court, appellant produced testimony demonstrating, it is submitted, that the regulation advances the legitimate state interests characterized as furthering the safety of the State troopers, furthering the safety and protection of the public, and furthering the efficiency of the Division of State Police in the discharge of its duties.

May a state police agency constitutionally regulate the personal appearance of its officers upon the legitimate state interests of safety and efficiency?

2. Prior to the adoption of the regulation by appellant, it was submitted to the Executive Committee of the collective bargaining agent certified to represent the appellee employee. (This procedure was required under Article XVI of the contract between the Division of State Police and the Police Benevolent Association of the New York State Police, Inc. (PBA).) With minor modification the PBA approved the regulation as proposed.

Does the approval of the regulation by the collective bargaining agent of the appellee waive such constitutional rights as appellee may have had?

Statement of the Case

Appellee is a member of the Division of New York State Police. He holds the rank of trooper.

Appellant Kirwan, at all times during these proceedings was the Superintendent of the Division of New York State Police. He will have retired from the Division effective June 25, 1975 after having served in the Division for approximately 38 years. He will be replaced as Superintendant on that date by William Connelie.

The New York State Police is a division of the Executive Branch of the Government of the State of New York. Its primary duty is the enforcement of the Laws of the State of New York. The law enforcement duties of the New York State police are discharged primarily in the rural areas of New York State.

On May 26, 1972, pursuant to his statutory authority, appellant promulgated Article IV, § 4.18 of Part III of the New York State Police Manual. That regulation is the regulation challenged by appellee, the enforcement of which was enjoined by the District Court on constitutional grounds.

Appellee was orally ordered to comply with that regulation on October 12, 1973. Appellee refused to comply with that order and others. Following the institution of formal disciplinary charges, appellee requested the administrative hearing to which he was entitled.

Appellee thereupon on December 31, 1973 brought suit against appellant requesting that the regulation be declared unconstitutional as infringing upon his First, Fifth, Ninth and Fourteenth Amendment freedoms. He further requested that a permanent injunction issue by a three judge Court to enjoin the enforcement of that regulation.

At the request of appellee, the administrative hearing was held in abeyance by appellant pending the outcome of that suit.

Appellant, by motion dated January 3, 1974, moved the District Court for an order dismissing the complaint upon multiple grounds including the failure of appellee to raise a substantial constitutional question.

The District Court, by order entered April 24, 1974, held that a substantial constitutional question had been raised, deferred argument in the remaining grounds for dismissal, and requested the Honorable Chief Judge of the Court of Appeals, Second Circuit, to convene a three judge Court pursuant to 28 U.S.C. §§ 2281 and 2284, Appendix B, *infra*, p. 19a.

By order dated April 30, 1974, the Honorable Chief Judge of the United States Court of Appeals, Second Circuit, designated the panel to hear the case. That order is printed in Appendix B, *infra*, at p. 17a.

A hearing was held on May 29, 1974 before a member of that panel, the Honorable John T. Curtin, Chief Judge of the District Court, Western District of New York. Substantial

testimony was offered by appellant in defense of the regulation challenged, both on the basis of safety and efficiency.

Thereafter, on June 20, 1974, the three judge District Court heard oral argument on appellant's motion to dismiss the complaint and on the merits of the action.

By decision and order dated March 4, 1975, the District Court declared the regulation to be an unconstitutional infringement upon appellee's Fourteenth Amendment rights and by judgment entered March 6, 1975 permanently enjoined the enforcement by appellant of Article IV, § 4.18 of Part III of the New York State Police Manual.

The Honorable Harold P. Burke, District Judge, dissented in a separate opinion printed in Appendix A, *infra*, at p. 15a.

The Questions Presented are of Substantial Constitutional Importance

I. The State Police may constitutionally regulate the personal appearance of its officers upon the legitimate state interests of safety and efficiency.

Appellant presented substantial documentary and testimonial evidence at a hearing held before the Honorable John T. Curtin, Chief District Court Judge, a member of the three judge Court.

That evidence supported appellant's contention that the regulation advanced the legitimate state interests of safety and efficiency of operation of the New York State Police, as well as the legitimate state interest of protecting the safety of the citizens of the State of New York.

Assuming that the regulation of hair length is subject to constitutional scrutiny, the appropriate test to be applied in

scrutinizing the regulation is whether the restrictions are justified by legitimate state interests rationally related to the regulation. *Dwen* v. *Barry*, 483 F. 2d at 1130, *Stradley* v. *Anderson*, 478 F. 2d 188 (8th Cir. 1973).

The District Court in the case at bar found that,

> "the true motivation for the promulgation of § 4.18 was a desire for uniformity of appearance. [footnotes omitted] 'Uniformity for uniformity's sake does not establish a public need. *Dwen v. Barry*, No. 71 C 1020 (E.D.N.Y. May 30, 1974) at 5'." *Romano* v. *Kirwan*, No. 73-629 (March 6, 1975) Appendix A, *infra*, at p. 14a.

That holding, is in direct conflict with the decision of the United States Court of Appeals, Eighth Circuit, in *Stradley* v. *Anderson*, *supra*, 478 F. 2d 188 (8th Cir. 1973) affirming the District Court in *Stradley* v. *Anderson*, 349 F. Supp. 1120 (D. Nebraska 1972).

The District Court said,

> "*Grooming standards, as part of uniform regulations, are a legitimate state interest.* The desire of the police officer for individuality in the selection of his hair style and length is outweighed by the legitimate state interest in immediate public recognition of bona fide police officers." *Stradley, supra*, 349 F. Supp. at 1123. (Emphasis Added)

The Court of Appeals, Eighth Circuit, said in affirming the District Court,

> "The critical factor is that police officialdom deems it necessary that the officer be well disciplined and that as part of that internal discipline he be required to maintain a neat appearance. The degree of that appearance, as long as it is not arbitrary or unreasonable, should not be the Court's concern". *Stradley* v. *Anderson*, *supra*, 478 F. 2d 188 at 192.

The decision of the Court below in the instant case also conflicts with the holding of New York State's highest Court.

The New York State Court of Appeals in *Greenwald* v. *Frank*, 32 N.Y. 2d 862, 346 N.Y.S. 2d 529 (1973) affirmed a determination by the lower Court that neatness and discipline were necessary to the efficient operation of a police department. *Greenwald* v. *Frank*, 70 Misc. 2d 632, 334 N.Y.S. 2d 680, judgment aff'd. as modified 40 A.D. 2d 717, 346 N.Y.S. 2d 529 (1973).

That case involved a regulation virtually identical to the regulation declared unconstitutional in the case at bar.

The Honorable Harold P. Burke, District Judge, wrote in his dissent in the case at bar,

> "The regulation under attack bears a rational relationship to the legitimate State interest sought to be advanced. The regulation would tend to promote discipline, so necessary in a law enforcement organization, would foster respect for the New York State Police in the community, and thus promote its efficiency. The Division of the New York State Police enjoys an extremely favorable reputation of professionalism. This contributes materially to its effectiveness". Appendix A, *infra*, at p. 15a.

The fact that the union representing appellee as his collective bargaining agent approved the regulation, suggesting only a minor change is indicative of the fact that the regulation serves the efficiency and safety of the New York State Police. This was recognized by District Judge Burke, he wrote,

> "It is worthy of note that the bargaining agent for the entire membership of the New York State Police (below lieutenant rank) agreed to the regulation. To me this is convincing evidence of the opinion of the rank and file of the New York State Police that the regulation serves a necessary and desirable function in maintaining the reputation of professionalism for the members of the State Police". Appendix A, *infra*, at p. 16a.

The law enforcement activities carried on by the New York State Police occur primarily in rural New York State.

A major thrust of appellant's proof to the Court below that the regulation advanced the legitimate state interest of efficiency of operations was that a neat uniform appearance was most likely to engender the cooperation of the public served by the Division. This cooperation is essential to the efficient and effective operations of the New York State Police.

It is submitted that the decision of the Court below is erroneous and that the conflicting decisions of *Stradley* v. *Anderson, supra*, 478 F. 2d 188 (8th Cir. 1973), and *Greenwald* v. *Frank, supra*, 32 N. Y. 2d 862 (1973) are correct.

The sharply conflicting opinions of the Court of Appeals, Second and Eighth Circuits, have been accepted for review by this Court. *Barry* v. *Dwen*, Docket No. 74-1269 cert. granted May 27, 1975.

The other legitimate state interests advanced by appellant as justification for the regulation was the safety of the police officer and the public he serves.

Appellant presented substantially uncontroverted documentary and testimonial evidence that long hair, sideburns, etc., would interfere with the wearing of a gas mask,[5] could be utilized by an opponent in a hand-to-hand fight, could obscure the vision of the police officer during a gun fight or high speed automobile chase, and could in other ways seriously jeopardize the safety of the trooper and the public.

The District Court nevertheless chose to give little weight to the safety aspects of the regulations. The basis of the Court's

---

[5] It was on this basis that a similar regulation of a local fire department was upheld by the District Court in *Michini* v. *Rizzo*, 379 F. Supp. 837 (E. D. Penna. 1974).

decision was that it felt that these interests had not been considered during the promulgation of the regulation.

> "A review of all of the testimony, however, and the circumstances surrounding the adoption of Section 4.18 leads one to the conclusion that little weight should be accorded to the testimony regarding safety considerations. *Before adopting the regulation, the Executive Committee evidently did not consider any of those factors.*" *Romano, supra,* Appendix A, *infra,* at pp. 11a-12a (Emphasis added).

Relative to the use of hair in hand-to-hand combat, the District Court said,

> "To justify Section 4.18 on the possibility that a struggling opponent may use a state policeman's long hair in hand-to-hand combat is not reasonable. *This factor was not considered by the Executive Committee in their deliberations.*" *Supra* at Appendix A, *infra,* p. 12a. (Emphasis added).

Finally, the Court said,

> "An analysis of the testimony and the documentary evidence discloses that the *true motivation* for the promulgation of section 4.18 was a desire for uniformity of appearance." [12] *Supra,* Appendix A, *infra,* p. 14a. (Emphasis added).

Although appellant takes issue with the District Court's finding that appellant did not consider the safety of the trooper in promulgating the regulation, the Court's error of constitutional dimension occurred in its misconstruction of the legitimate state interest test.

A state's encroachment upon a constitutionally protected right not enumerated among those "fundamental rights", *Griswold* v. *Connecticut,* 381 U. S. 506, 85 S.Ct. 1678, 14 L. Ed. 2d 510 (1965) will be permitted if that encroachment advances a legitimate state interest rationally related to the restriction. *Richards* v. *Thurston,* 424 F. 2d 1281, 1284 (1st

Cir. 1970); *Dwen* v. *Barry,* 483 F. 2d 1126, 1130 (2d Cir. 1973); *Stradley* v. *Anderson,* 478 F. 2d 188 (8th Cir. 1973).

It is submitted that the District Court erred by placing its emphasis on determining what factors were the prime movers in the promulgation of the regulation as opposed to placing its emphasis on those legitimate state interests that are now served by the regulation.

II. The approval of the regulation by appellee's collective bargaining agent waived such constitutional rights as appellee may have had.

The contract between the collective bargaining agent for appellee, the Police Benevolent Association of New York State Police, Inc., and the appellant provided that proposed rule changes were required to be submitted to the union for review.

The proposed regulation was submitted as required. The union, by its president and executive board reviewed and approved the regulation promulgated as Part III, Article IV, §4.18 of the New York State Police Manual.

A minor change was proposed by the union which would have permitted the sideburns to grow longer.

This Court has held that it "will not presume acquiescence is loss of fundamental rights." *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n.,* 301 U. S. 292, 307, 57 S.Ct. 724, 731, 81 L. Ed. 1093 (1937).

Notwithstanding that no *presumption* of acquiescence will attach, this Court has consistently held that a waiver of those rights can be effective if certain standards are applied to the waiver. *D. H. Overmyer Co., Inc. of Ohio* v. *Frick Co.,* 405 U. S. 174, 92 S.Ct. 775, 31 L. Ed. 2d 124 (1972); *National Equipment Rental, Ltd.* v. *Szuklent,* 375 U. S. 311, 84 S.Ct. 411, 11 L.

Ed. 2d 354 (1964); *Boddie* v. *Connecticut*, 401 U. S. 371, 91 S.Ct. 780, 28 L. Ed. 2d 112 (1971).

A union's waiver of its members' statutory rights are likewise permitted by this Court. *N.L.R.B.* v. *Magnavox*, ... U. S. ..... 94 S.Ct. 1099, ... L. Ed. 2d ..... U. S. ....., 94 S.Ct. 1099, ... L. Ed. 2d 448, 77 S.Ct. 912, 1 L. Ed. 2d 972 (1957).

It is believed that the District Court erroneously held that the standards set forth in *D. H. Overmyer* v. *Frick, supra*, 405 U. S. at 184, 92 S.Ct. at 782 were not satisfied in the case at bar.

CONCLUSION.

This appeal raises issues of substantial constitutional importance. There is division among the circuits as to the resolution of some of those issues with resulting inconsistent determinations being rendered throughout the United States. Plenary consideration should be had by this Court.

Dated: June 18, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Appellant,
65 Court Street,
Buffalo, New York 14202,
Telephone: (716) 842-4385.

RUTH KESSLER TOCH,
Solicitor General.

DOUGLAS S. CREAM,
Assistant Attorney General,

of Counsel.

APPENDIX A.

Notice of Entry of Judgment of March 6, 1975.

UNITED STATES DISTRICT COURT

Western District of New York

DONALD F. ROMANO,

vs.

WILLIAM E. KIRWAN, Superintendent of the New York State Police.

Civ-1973-629.

Sir:

Take notice of a Judgment, of which the within is a copy, duly granted in the within entitled action on the 6th day of March, 1975, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 6th day of March, 1975.

Dated: Buffalo, New York
March 6, 1975

JOHN K. ADAMS, *Clerk*,
U.S. District Court,
U.S. Courthouse,
Buffalo, New York 14202.

Appendix A.

To:
Rocco Potenza, Esq.,
Michael J. Hutter, Esq.,
Christian G. Koelbl, III, Esq.,
Attorney for Plaintiff.

Louis J. Lefkowitz, Esq.,
Attorney for Defendant.

Judgment Dated March 6, 1975 Over the Signature of John K. Adams, Clerk.

UNITED STATES DISTRICT COURT

Western District of New York

DONALD F. ROMANO,

Plaintiff.

vs.

WILLIAM E. KIRWAN, Superintendent of the New York State Police,

Defendant.

Civil No. 1973-629.

This action came on for hearing before Timbers, Circuit Judge, Curtin, Chief District Judge, and Burke, District Judge, and the issues having been duly heard, a decision having been duly rendered,

Appendix A.

IT IS ORDERED and ADJUDGED that judgment is granted in favor of the plaintiff and against the defendant declaring Section 4.18 of Part III of the New York State Police Manual unconstitutional, void and of no effect, and permanently enjoining the defendant from enforcing Section 4.18.

Dated at Buffalo, New York, this 6th day of March, 1975.

JOHN K. ADAMS,
Clerk.

Notice of Entry of an Order Dated March 4, 1975, Entered March 6, 1975.

UNITED STATES DISTRICT COURT

Western District of New York

DONALD F. ROMANO,

vs.

WILLIAM E. KIRWAN, Superintendent of the New York State Police.

Civ-1973-629.

Sir:

Take notice of an Order, of which the within is a copy, duly granted in the within entitled action on the 4th day of March,

Appendix A.

1975, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 6th day of March, 1975.

Dated: Buffalo, New York
March 6, 1975.

JOHN K. ADAMS, *Clerk,*
U.S. District Court,
U.S. Courthouse,
Buffalo, New York 14202.

To:

Rocco Potenza, Esq.,
Michael J. Hutter, Esq.,
Christian G. Koelbl, III, Esq.,
Attorney for Plaintiff.

Louis J. Lefkowitz, Esq.,
Attorney for Defendant.

Appendix A.

Order of Three Judge Court Dated March 4, 1975, Together With Footnotes Thereto.

UNITED STATES DISTRICT COURT

Western District of New York

DONALD F. ROMANO,

Plaintiff,

vs.

WILLIAM E. KIRWAN, Superintendent of the New York State Police,

Defendant.

Civil 1973-629.

Before Timbers, Circuit Judge, Curtin, Chief District Judge, and Burke, District Judge.

Appearances:

Rocco D. Potenza, Esq. (Christian G. Koelbl, III, Esq. and Michael J. Hutter, Esq., of Counsel), Buffalo, New York, for Plaintiff.

Louis J. Lefkowitz, Esq., Attorney General of the State of New York (Douglas S. Cream, Esq., Assistant Attorney General, of Counsel), Buffalo, New York, for Defendant.

CURTIN, *D.J.*

Plaintiff, a New York state policeman holding the rank of trooper, commenced this action under 28 U.S.C. §§ 1331(a)

and 1343(3) alleging the unconstitutionality of the regulation setting standards for state police personal grooming, Section 4.18 of Part III of the New York State Police Manual.[1] After this court granted plaintiff's motion for the convening of a three-judge court, *Romano v. Kirwan*, Civil No. 1973-629 (W.D.N.Y. Apr. 24, 1974), testimony was heard on May 29, 1974. On June 20, 1974 the three-judge court heard oral argument on defendant's motion to dismiss the complaint. The following constitutes the single judge's findings of fact and the panel's conclusions of law drawn from these facts.

Defendant makes several preliminary arguments which are without merit. The first is that plaintiff lacks standing. He is a New York state policeman subject to Section 4.18 and disciplinary proceedings for his alleged noncompliance are currently pending. The "threatened or actual injury" standard is clearly met. *See Flaust v. Cohen*, 392 U.S. 83 (1968); *Baker v. Carr*, 369 U.S. 136 (1962).

[1] Section 418 provides as follows:

All members, both Uniform and Bureau of Criminal Investigation, shall adhere to these guidelines and criteria. Members may be excluded from these limitations by Troop or Detail Commanders when special assignments require deviation.

a. Hair will be neatly groomed and tapered and will not fall over the ears or eyebrows or touch the collar except for the closely cut hair at the back of the neck. The bulk or length of hair will not interfere with the normal wearing of all emergency or Division headgear.

b. Sideburns will be neatly trimmed and will not be of the muttonchop or flared type. The base of the sideburns will be clean-shaven on a horizontal line and shall not extend below the lowest part of the exterior ear opening.

c. The face will be clean-shaven except that mustaches will be permitted. If worn, mustaches will be kept neatly trimmed and shall not extend beyond the corners of the mouth nor fall below the center line of the lips.

Defendant also argues that plaintiff must be required to exhaust his administrative remedies, but exhaustion is excused because the challenge would be to the very person who promulgated the challenged regulation, and therefore would "certainly or probably" be a futile gesture. *Eisen v. Eastman*, 421 F.2d 560, 569 (2d Cir. 1969).

Defendant argues that plaintiff has waived his right to bring this action because the Police Benevolent Association of the New York State Police, Inc. [PBA], the collective bargaining unit for the New York state police, has approved the challenged regulation. It is argued that the approval contained in a letter dated May 18, 1972 from William A. Thompson, President of the PBA (Exhibit 10), constitutes a waiver of plaintiff's rights under the standard set forth in *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972). In that case the Supreme Court provided that an individual may waive a constitutional right by contract if the waiver was "voluntary, knowing, and intelligently made . . . or an intentional relinquishment or abandonment of a known right or privilege, ..." 405 U.S. at 185-86. Defendant has failed to prove a waiver under the above standard.

Finally, defendant asserts that this is a proper case for the doctrine of abstention. Absention should not be applied where there is no uncertainty or ambiguity in the state statute which might be clarified by state interpretation. *See, e.g. Wisconsin v. Constantineam*, 400 U.S. 433 (1971). Further, there are no special circumstances here to justify the delay and additional expense derived from application of the abstention doctrine. *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498 (1972).

Turning to the merits, all counsel agree with the panel that the instant case is controlled by *Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973). The *Dwen* court held that the right of the in-

dividual to style his own appearance "is an ingredient of an individual's personal liberty" and is protected by the Due Process Clause of the fourteenth amendment. 483 F.2d at 1130. Thus, "any restriction on [the choice of personal appearance] must be justified by a legitimate state interest reasonably related to the regulation" 483 F.2d at 1130.

The state interests advanced in support of Section 4.18 are: safety of the officer in carrying out his duties; a need to foster and maintain discipline among state policemen; and the necessity to present a favorable image in order to obtain public cooperation with the state police.[2] Agreeing that these are all legitimate state interests, the question remains whether the enumerated interests are reasonably related to Section 4.18.

In 1962 the Division of State Police promulgated a regulation which provided that "[i]t shall be the duty of each number of the Division to exercise proper care and give proper attention to his person, clothing and equipment to insure that he presents a neat, clean and businesslike appearance at all times." Section 0.5 of Part III of the New York State Police Manual. The Executive Committee of the Division of State Police initiated study of this section in 1970. On August 12, 1971 Deputy Chief Inspector of the Division of State Police, R. D. Quick, sent a memorandum to Chief Inspector J. C. Miller suggesting that there existed a need for more specific guidelines relating to personal appearance. Defendant's Ex. 5. Inspector Quick's memorandum was

[2] During the trial, the defendant presented evidence in support of all of those considerations. But the history of the formulation of the regulation revealed by correspondence and the records of the state police made while the state police authorities were attempting to spell out a regulation indicate that safety factors were not considered by the officers who prepared the regulation. Discipline and public acceptance of the state police were the main considerations.

precipitated when he observed Trooper Romano, the plaintiff in this case, at a training class with "an unusual and extreme mustache, sideburns and long hair style." *Id.* In his memo suggesting a need for more specific guidelines relating to personal appearance, the inspector emphasized image and discipline, but did not discuss safety. Inspector A. L. Bardossi made a survey and proposed personal appearance guidelines in a memorandum to Chief Inspector G. L. Infante dated December 3, 1971, which was forwarded to Deputy Superintendent J. C. Miller. Defendant's Ex. 6.[3] In his report Inspector Bardossi commented:

> Current hair styles have reached a point that their adoption by Division members, in their more extreme forms, is not acceptable to projecting the image desired by the Division. . . .
>
> The Division is semimilitary in organization and a neat well-groomed appearance is fundamental to inspiring public confidence. In this respect our need to inspire a sense of pride and self-discipline in our members closely parallels those of the military.
>
> The establishment of clear-cut guidelines serves two important functions:

[3] Inspector Bardossi's memo contained the following rationale:

> The Division is semimilitary in organization and a neat well-groomed appearance is fundamental to inspiring public confidence. In this respect our need to inspire a sense of pride and self-discipline in our members closely parallels those of the military.
>
> The establishment of clear-cut guidelines serves two important functions:
>
> a. Provides a criteria against which the individual member can measure his appearance.
>
> b. Enables supervisory personnel to regulate and control the personal appearance of subordinates.

a. Provides a criteria against which the individual member can measure his appearance.

b. Enables supervisory personnel to regulate and control the personal appearance of subordinates.

Id.

Inspector Bardossi's emphasis was on the image of the state police and discipline rather than safety.

At the meeting of the Executive Committee on December 16, 1971, Chief Inspector Infante was instructed to prepare proposed guidelines to be distributed to troop commanders in the field. Defendant's Ex. 7. Thereafter, a letter was sent to William A. Thompson, President of the New York State PBA (then certified bargaining agent of New York State police members below rank of Lieutenant), along with the proposed set of guidelines. Defendant's Ex. 9.[4] Mr. Thompson responded by a letter to defendant dated May 18, 1972, in which he stated that the PBA Executive Board substantially concurred with the regulations but disagreed with the sideburn provisions. Defendant's Ex. 10.[5] The Executive Board rejected the change proposed by Mr. Thompson. Defendant's Exs. 11 and 12. By memorandum of May 26, 1972, defendants

[4] These proposed guidelines sent to Mr. Thompson ultimately were promulgated as Section 4.18 of Part III of the New York State Police Manual.

[5] It is felt that [the sideburn length regulation] could be worded to read, "to the lower part of the exterior ear with a straight cut. There are to be no tapering of the end, or is the sideburn permitted to grow bushy."

Defendant's Ex. 10.

promulgated the proposed guidelines as Section 4.18 of part III of the New York State Police Manual. Defendant's Ex. 14.[6]

Plaintiff, Donald Romano, a member of the New York state police for twelve years, has black hair and sideburns and has not altered his appearance for some time. His sideburns are even with the lower lobe of his ear; his mustache is approximately a sixteenth to an eighth of an inch below his upper lip, and the back of his hair is slightly over his collar, straight and neat. Tr. at 177.[7] The defendant called Chief Inspector Daniel Dakin and counsel Richard Bolton as witnesses in support of the reasonableness of Section 4.18. Inspector Dakin referred to several safety reasons in explaining why the section was necessary. He testified that the wearing of long hair, facial hair and sideburns will interfere with an effective seal necessary for the proper wearing of a gas mask. Tr. at 18, 27. He said that "[t]he critical point is the fact that it fits snugly to prevent the substance from being inhaled." Tr. at 27. In his opinion, long hair could be used as an effective weapon by an assailant, Tr. at 27, 30, and, by falling into a policeman's eyes, long hair could obscure his sight while he was trying to use firearms. Tr. at 30. A review of all of the

[6] In his memorandum to all members, Superintendent Kirwan introduced the regulations:

The longer hair styles, mustaches and beards are today being worn by many in the business world. However, the Division of State Police is basically a semi-military organization and must adhere to a more conservative uniformity in grooming in order to present a more acceptable appearance to the public. A well-groomed appearance is fundamental to inspiring public confidence. To more clearly define the acceptable limitations on personal appearance, a new section is being added to the Instructions in the Manual.

Defendant's Ex. 14.

[7] All transcript references are to testimony taken before Judge Curtin, May 29, 1974.

testimony, however, and the circumstances surrounding the adoption of Section 4.18 leads one to the conclusion that little weight should be accorded to the testimony regarding safety considerations. Before adopting the regulation, the Executive Committee evidently did not consider any of these factors. Furthermore, the testimony about gas masks indicates that neither mustaches nor hair length interfere with the gas mask seal and that there is only a possibility that sideburns could interfere with the seal, and there is no proof that the sideburn length specified in Section 4.18 bears a reasonable relationship to having a good gas mask seal.[8]

To justify Section 4.18 on the possibility that a struggling opponent may use a state policeman's long hair in hand-to-hand combat is not reasonable. This factor was not considered by the Executive Committee in their deliberations. Since the key to this danger is the amount of hair available to grip, the fact that the section does not regulate length of hair on top of the head undercuts this justification. Furthermore, it would seem that hair worn at collar length could be grasped almost as easily as hair worn a little bit longer. If the state police truly considered this a safety factor, the regulation would require hair to be worn much shorter than collar length.[9]

As to the third safety factor, that hair might fall into a state policeman's eyes and interfere with the sighting of his gun, testimony on this point was highly speculative. It was not con-

[8] Indeed, the "American National Standard Practices for Respiratory Protection" suggests that *any* sideburns may prevent an effective gas mask seal. *See* Defendant's Ex. 3.

[9] It is apparent that little reliance was placed upon this factor to those who prepared the regulation for they did not discuss it. Furthermore, an assailant could grasp the length of hair permitted by the regulation. If this was a serious factor, the regulation would only permit very short haircuts.

sidered during formative stages and there are other simpler ways to handle this problem. This reason will not suffice to make legitimate Section 4.18.

Chief Dakin and counsel Bolton also explained the need for obtaining public cooperation with the state police, and discipline. Chief Dakin explained that a neat personal appearance of New York state policemen, particularly in rural areas, is absolutely necessary in police work.[10]

No testimony explained precisely how Section 4.18 accomplishes the end of discipline. However, in defendant's Exhibit 6, the "semi-military" nature of the state police was referred to.[11] "Discipline although essential to an effective police force as it is to the military is *clearly of a different type.*" *Dwen v. Barry, supra,* at 1129 (emphasis added). "[I]t has been suggested that the military model of organization and discipline must not be followed too closely as a policeman unlike a soldier frequently acts individually on his own initiative and not subject to the immediate supervision of his superiors." *Id.*

Finally, there is no evidence that Section 4.18 encourages public cooperation via its *specific* guidelines. The more general regulation, Section 8.5, refers to a neat, clean and businesslike appearance. Also, the argument that, because state police activities are largely concentrated in rural areas, personal appearance of state policemen should be strictly de-

[10] However, State Policeman James Kleinsmith, who has recently served in rural areas, testified that the style in which he wears his hair and mustache, similar to that of Trooper Romano's, has, in his opinion, "more or less helped me rather than hindered me in my personal dealings with the public." Tr. at 193.

[11] *See* n. 2, *supra.* The same memo emphasizes that the draft of Section 4.18 and its subsections are essentially Army regulations. Defendant's Ex. 6.

fined was contradicted by the testimony of a tropper recently assigned to a rural area.

An analysis of the testimony and the documentary evidence discloses that the true motivation for the promulgation of Section 4.18 was a desire for uniformity of appearance.[12] "Uniformity for uniformity's sake does not establish a public need." *Dwen v. Barry,* No. 71 C 1020 (E.D.N.Y. May 30, 1974) at 5. Since we find no other legitimate state interests reasonably advanced by the regulation, Section 4.18 cannot withstand the present constitutional attack.

Judgment is granted in favor of the plaintiff and against the defendant declaring Section 4.18 of Part III of the New York State Police Manual unconstitutional, void and of no effect, and permanently enjoining the defendant from enforcing Section 4.18.

So ordered.

/s/ WILLIAM H. TIMBERS,
United States Circuit Judge.

/s/ JOHN T. CURTIN,
United States District Judge.

Dated: March 4, 1975.

---

[12] *See* n. 2 & 5, *supra.*

Dissenting Opinion of the Hon. Harold P. Burke, Dated March 3, 1975.

UNITED STATES DISTRICT COURT
Western District of New York

DONALD F. ROMANO,

Plaintiff,

vs.

WILLIAM E. KIRWAN, Superintendent of the New York State Police,

Defendant.

Civil 1973-629.

Before Timbers, Circuit Judge, Curtin, Chief District Judge, and Burke, District Judge.

With due deference I dissent. Based upon the evidence I would hold: The regulation under attack bears a rational relationship to the legitimate State interest sought to be advanced. The regulation would tend to promote discipline, so necessary in a law enforcement organization, would foster respect for the New York State Police in the community, and thus promote its efficiency. The Division of the New York State Police enjoys an extremely favorable reputation of professionalism. This contributes materially to its effectiveness. It is necessary that members of the Division of State Police be well disciplined. A necessary part of internal discipline is that the members of the State Police be well groomed and maintain a neat and uniform appearance. It is

worthy of note that the bargaining agent for the entire membership of the New York State Police (below lieutenant rank) agreed to the regulation. To me this is convincing evidence of the opinion of the rank and file of the New York State Police that the regulation serves a necessary and desirable function in maintaining the reputation of professionalism for the members of the State Police. I would give judgment for the defendant.

HAROLD P. BURKE,
United States District Judge.

March 3, 1975.

Amendment Fourteen of the United States Constitution Section 1.

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

APPENDIX B.

Designation of Judges Dated April 30, 1974.

UNITED STATES DISTRICT COURT
Western District of New York

DONALD F. ROMANO,
Plaintiff,

against

WILLIAM E. KIRWAN, Superintendent of the New York State Police,
Defendant.

Civil 1973-629.

Having been notified by the Honorable John T. Curtin, Chief Judge, United States District Court, Western District of New York, that an application has been filed in the above matter for relief pursuant to 28 U. S. C. 2281 and 2284, I hereby designate the following judges, in addition to the Honorable John T. Curtin, to hear and determine said cause as provided by law: Honorable William H. Timbers, United States Circuit Judge, United States Court of Appeals for the Second Circuit, and Honorable Harold P. Burke, United States District Judge, United States District Court for the Western District of New York.

IT IS HEREBY ORDERED that this order be filed in the above matter in the United States District Court for the Western District of New York.

IRVING R. KAUFMAN,
Chief Judge,
United States Court of Appeals,
Second Circuit.

New York, New York, April 30, 1974.

Appendix B.

Notice of Entry of Order Dated April 24, 1974.

UNITED STATES DISTRICT COURT
Western District of New York

DONALD F. ROMANO,

vs.

WILLIAM E. KIRWAN, Superintendent of the New York State Police.

Civ-1973-629.

Sir: Take notice of an ORDER, of which the within is a copy, duly granted in the within entitled action on the 24th day of April, 1974, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 24th day of April, 1974.

Dated: Buffalo, New York, April 24, 1974.

JOHN K. ADAMS, *Clerk,*
U. S. District Court,
U. S. Courthouse,
Buffalo, New York 14202.

To:
Rocco D. Potenza, Esq.,
Michael J. Hutter, Esq.,
Christian G. Koelbl, Esq.,
Attorney for Plaintiff.

To:
Louis J. Lefkowitz, Esq.,
Attorney for Defendant.

Federal Rules of Civil Procedure 77 (d).

Appendix B.

Order Dated April 24, 1974 by the Hon. John T. Curtin.

UNITED STATES DISTRICT COURT
Western District of New York

DONALD F. ROMANO,

Plaintiff,

vs.

WILLIAM E. KIRWAN, Superintendent of the New York State Police,

Defendant.

Civil 1973-629.

Appearances:
Rocco D. Potenza, Esq., Michael J. Hutter, Esq., Christian G. Koelbl, III, Esq., Buffalo, New York, for Plaintiff.

Louis J. Lefkowitz, Attorney General, State of New York (Douglas S. Cream, of Counsel), for Defendant.

Plaintiff has brought this action under 28 U. S. C. §§ 1331(a) and 1343(3) alleging the unconstitutionality of the regulation contained in Section 4.18 of Part III of the New York State Police Manual. The challenged regulation sets up New York State Police standards for personal grooming, particularly hair length:

> All members, both Uniform and Bureau of Criminal Investigation, shall adhere to these guidelines and criteria.
>
> Members may be excluded from these limitations by Troop or Detail Commanders when special assignments require deviation.

a. Hair will be neatly groomed and tapered and will not fall over the ears or eyebrows or touch the collar except for the closely cut hair at the back of the neck. The bulk or length of hair will not interfere with the normal wearing of all emergency or Division headgear.

b. Sideburns will be neatly trimmed and will not be of the muttonchop or flared type. The base of the sideburns will be clean-shaven on a horizontal line and shall not extend below the lowest part of the exterior ear opening.

c. The face will be clean-shaven except that mustaches will be permitted. If worn, mustaches will be kept neatly trimmed and shall not extend beyond the corners of the mouth nor fall below the center line of the lips.

The complaint requests injunctive relief and the convening of a three-judge court pursuant to 28 U. S. C. §§ 2281 and 2284. The defendant has agreed to stay disciplinary proceedings against the plaintiff based upon plaintiff's alleged violation of the regulation pending disposition of this action. Thus, there is no temporary restraining order in effect.

Upon application for a three-judge court, the district judge before whom the application is made must determine whether the constitutional claim raised is substantial, whether the complaint, at least formally, alleges a basis for equitable relief, and whether the case otherwise comes within the requirements of the three-judge statute. *See Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713 (1962).

The court is satisfied that a substantial constitutional question is presented. *See Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973). The court is also satisfied that there is a basis for

equitable relief and that this court has subject matter jurisdiction under 42 U. S. C. § 1983 and 28 U. S. C. §§ 1343(3), 2281 and 2284. The other arguments presented by defendant at this time, particularly abstention and waiver, are properly matters for consideration by the three-judge court.

Accordingly, the Honorable Chief Judge of the United States Court of Appeals for the Second Circuit is hereby requested to convene a three-judge court to hear and determine this cause.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: April 24, 1974.

APPENDIX C.

Notice of Appeal to the Supreme Court of the United States.

UNITED STATES DISTRICT COURT
Western District of New York

DONALD F. ROMANO,
Plaintiff-Appellee,

against

WILLIAM E. KIRWAN, Superintendent of the New York State Police,
Defendant-Appellant.

Civil-1973-629.

Notice is hereby given that defendant William E. Kirwan, Superintendent of the New York State Police, hereby appeals to the Supreme Court of the United States from the final Order and Judgment of a Three-Judge District Court entered in this action on March 6, 1975, which granted judgment in favor of the plaintiff against the defendant (1) declaring section 4.18 of Part III of the New York State Police Manual unconstitutional, void and of no effect and (2) permanently enjoining the defendant from enforcing section 4.18, and defendant appeals from each and every part of that Order as well as from the whole thereof.

This appeal is taken pursuant to 28 U. S. C. § 1253.

Dated: Buffalo, New York, April 23, 1975.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
/s/ By: Douglas S. Cream,
Assistant Attorney General,
Attorney for Defendant-Appellant,
Department of Law,
65 Court Street,
Buffalo, New York 14202,
Telephone: (716) 842-4385.

To:

Hon. John K. Adams, *Clerk,*
United States District Court
for the Western District of New York,
United States Court House,
68 Court Street.
Buffalo, New York 14202.

Rocco Potenza, Esq.,
Michael J. Hutter, Esq.,
Christian G. Koelbl, Esq.,
Attorneys for Plaintiff-Appellee,
1800 One M & T Plaza,
Buffalo, New York 14203.

Filed on the 23rd day of April 1975 in the office of the Clerk of the District Court for the Western District of New York.

Supreme Court, U. S.
FILED
AUG 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1622

WILLIAM E. KIRWAN, Superintendent of the New York State Police,

Appellant,

vs.

DONALD F. ROMANO,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM

MICHAEL J. HUTTER,
Western New England Law School,
1215 Wilbraham Road,
Springfield, Massachusetts 01119,

CHRISTIAN G. KOELBL III,
1800 One M & T Plaza,
Buffalo, New York 14203,

Attorneys for Appellee.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

INDEX.

PAGE

Statement of the Case 2

I. The Context and Commencement of This Litigation 2

II. The Trial 3

III. The District Court's Opinion and Judgment... 5

Argument 6

I. A policeman has a constitutional right to choose the length and style of his hair, sideburns, and mustache 6

II. Appellant has not made the factual showing necessary to justify the infringement by Section 4.18 of appellee's right to choose the length and style of his hair, sideburns and mustache.. 8

1. Safety 9

2. Discipline 12

3. Public Cooperation 12

III. Appellee's right to bring this action has not been waived 13

Conclusion 16

TABLE OF CASES AND STATUTES.

Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971) 7

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 10, 12

D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) .. 5, 13, 15

Dwen v. Barry, No. 74-1269, *granting cert. to* 508 F.2d 836 (2d Cir. 1975) 1, 6, 16

Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973) 5, 7, 8

Garrity v. New Jersey, 305 U.S. 493 (1967) 8

Kahl v. Breen, 398 U.S. 937 (1970), *denying cert. to* 419 F.2d 1034 (7th Cir. 1969) 6

PAGE

Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292 (1937) 15
Roe v. Wade, 410 U.S. 113 (1973) 6, 7, 8, 12
Romano v. Kirwan, Civil No. 1973-629 (W.D.N.Y., April 24, 1974) 3
Romano v. Kirwan, 391 F.Supp. 643 (W.D.N.Y. 1975) ..5, 8, 9, 10, 13
Stradley v. Andersen, 478 F.2d 188 (8th Cir. 1973).... 7
Union Pacific Ry. v. Botsford, 141 U.S. 250 (1891).... 7
28 U.S.C. § 1331(a) 3
28 U.S.C. § 1343(3) 3

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1622

WILLIAM E. KIRWAN, Superintendent of the New York State Police,

Appellant,

vs.

DONALD F. ROMANO,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM

Appellee respectfully submits that the judgment of the District Court is so plainly correct as not to require plenary review. Accordingly, pursuant to Rule 16(1)(d) of the Rules of this Court, appellee moves that the judgment be summarily affirmed.

Alternatively, in light of this Court's recognition of the importance of the issues raised in this case by reason of its grant of certiorari in *Dwen v. Barry*, No. 74-1269 (certiorari granted May 27, 1975), appellee respectfully suggests that

it may be appropriate for this Court to order the two cases argued together as one case pursuant to Rule 43(5) of the Rules of this Court.

Statement of the Case

I. The Context and Commencement of This Litigation.

Appellee is a New York State Policeman holding the rank of Trooper.* Appellant was Superintendent of the New York State Police at the time the instant action was commenced and at all times prior thereto which are relevant to this action.

Prior to October 12, 1973, appellant promulgated Section 4.18 of Part III of the New York State Police Manual (hereinafter "Section 4.18"), which is presently in force and effect and which provides as follows:

> All members, both Uniform and Bureau of Criminal Investigation, shall adhere to these guidelines and criteria. Members may be excluded from these limitations by Troop or Detail Commanders when special assignments require deviation.
>
> a. Hair will be neatly groomed and tapered and will not fall over the ears or eyebrows or touch the collar except for the closely cut hair at the back of the neck. The bulk or length of hair will not interfere with the normal wearing of all emergency or Division headgear.
>
> b. Sideburns will be neatly trimmed and will not be of the muttonchop or flared type. The base of the sideburns will be clean-shaven on a horizontal line and shall not extend below the lowest part of the exterior ear opening.

* The facts stated in this and the next two paragraphs are set forth in Paragraphs 2, 3, 4, 5, 7 and 8 of appellee's Complaint and admitted in appellant's Answer.

> c. The face will be clean-shaven except that mustaches will be permitted. If worn, mustaches will be kept neatly trimmed and shall not extend beyond the corners of the mouth nor fall below the center line of the lips.

On October 12, 1973, one of appellee's commanding officers orally ordered him to bring himself into compliance with the requirements of Section 4.18. On October 18, 1973, appellant caused to be served upon appellee two charges arising out of his alleged failure to comply with the requirements of Section 4.18. If appellee were to be found guilty on either of the charges, he would be subject to certain penalties, including dismissal from the State Police.

On December 31, 1973, appellee commenced this action under 28 U.S.C. §§ 1331(a) and 1343(3), alleging the unconstitutionality of Section 4.18. By agreement between the parties, an administrative hearing as to aforementioned charges against appellee was adjourned pending the outcome of this action. On April 24, 1974, the District Court, Curtin, J., granted appellee's motion to convene a three-judge court. *Romano v. Kirwan,* Civil No. 1973-629 (W.D. N.Y., April 24, 1974).

II. The Trial.

A trial in this case was held on May 29, 1974, before the District Court, Curtin, J. Appellant presented testimony with respect to three state interests allegedly furthered by Section 4.18: (1) safety of the State Policeman in carrying out his duties; (2) public cooperation with State Policemen; and (3) discipline among State Policemen.

The Chief Inspector of the State Police, Daniel A. Dakin, testified as to several safety reasons. He stated that the wearing of sideburns or a beard (but not long hair or a

mustache) might possibly interfere with the seal necessary for the proper wearing of a gas mask. Tr. 18, 26-27, 86, 88.* He further testified that long hair could be used as an effective weapon by an assailant and that, by falling into a policeman's eyes, it could obscure his sight while he was trying to use a firearm. Tr. 27-30.

With respect to the second state interest allegedly furthered by Section 4.18, Mr. Dakin stated that, in his opinion, a neat personal appearance by State Policemen was needed, especially in rural areas, to obtain public cooperation. Tr. 31-32.

As to discipline, no testimony was offered as to how Section 4.18 advanced this state interest. The only reference to discipline was made in appellant's Exhibit 6, Tr. 106-107, an internal memorandum of the Division of State Police which, in recommending promulgation of personal appearance guidelines, referred to the Division as "semi-military in organization" and as having a "need to inspire a sense of pride and self-discipline in our members [which] closely parallels those of the military."

Appellee, a member of the New York State Police for twelve years, testified in his own behalf. It was noted by the District Court that he had sideburns even with the lower lobe of his ear, that his mustache was approximately one-sixteenth to one-eighth of an inch below his upper lip and that the back of his hair was slightly over his collar, straight and neat. Tr. 177.

Finally, State Policeman James Kleinsmith testified in support of appellee. Mr. Kleinsmith, who had recently served in a rural area, stated that the style in which he was

* References beginning with the abbreviation Tr. are to pages of the transcript of the trial.

wearing his hair and mustache (similar to that of appellee) had "more or less helped me rather than hindered me in my personal dealings with the public." Tr. 193.

III. The District Court's Opinion and Judgment.

In an opinion dated March 4, 1975, which is reported at 391 F.Supp. 643, the District Court held Section 4.18 unconstitutional. The District Court dealt with three points raised by appellant in this Court.

First, the District Court held that appellant had failed to prove a waiver of appellee's right to bring this action under the standard set forth in *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972). 391 F.Supp. at 644.

Second, citing *Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973), the District Court recognized the right of a man to choose the length and style of his hair, sideburns and mustache and held that any restriction by the state on this choice of personal appearance must be justified by a legitimate state interest reasonably related to the regulation. 391 F.Supp. at 645.

Lastly, the District Court rejected on factual grounds the three state interests advanced by appellant to justify Section 4.18's restriction of appellee's right to style his personal appearance. With respect to the safety argument, the court reviewed various internal documents and memoranda of the Division of State Police and determined that safety factors had never been considered by appellant prior to the promulgation of Section 4.18. *Id.* at 645-647. Moreover, the court rejected the presently proffered safety factors, finding that they were not supported by appellant's proof. *Id.* at 646-647. As to the remaining interests, the court found that there was no evidence that Section 4.18

furthered the discipline of, or encouraged public cooperation with, State Policemen. *Id.* at 647.

On March 6, 1975, the District Court entered judgment in favor of appellee and against appellant, declaring Section 4.18 unconstitutional, void and of no effect and permanently enjoining appellant from enforcing it.

ARGUMENT

I. A policeman has a constitutional right to choose the length and style of his hair, sideburns and mustache.

This Court has not confronted the issue whether or not a man has a constitutional right to determine the length and style of his hair, sideburns and mustache. *See, e.g., Kahl v. Breen,* 398 U.S. 937 (1970), *denying cert. to* 419 F.2d 1034 (7th Cir. 1969); *but see Dwen v. Barry,* No. 74-1269, *granting cert. to* 508 F.2d 836 (2d Cir. 1975). This Court has frequently recognized, however, that there exists a constitutional right to make a particular decision pertaining to one's own person. A recent example of such recognition appears in *Roe v. Wade,* 410 U.S. 113 (1973), in which it was held that the right of a woman to decide whether or not to terminate her pregnancy is a "liberty" protected by the Due Process Clause of the Fourteenth Amendment.

The issue whether or not a man has a constitutional right to style his personal appearance may seem to be insignificant, particularly when measured against the question whether or not a woman may have an abortion. In reality, however, both questions are particular applications of the same broader issue—whether or not an individual has the right to make decisions pertaining to his or her own

person which have no direct bearing on the ability of others to exercise their rights. As to this broader question, writing in a different context in a case cited in *Roe v. Wade, id.* at 152, this Court many years ago indicated its basic viewpoint as follows:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone."
>
> *Union Pacific Ry. v. Botsford,* 141 U.S. 250, 251 (1891).

Viewing the issue in this framework, a number of courts have held that an individual has a constitutional right to style his or her personal appearance. *E.g., Dwen v. Barry, supra,* 483 F.2d at 1130 (citing other cases). *Dwen* found the right to exist under the Due Process Clause of the Fourteenth Amendment; other courts have looked to other constitutional guarantees. *Id.* Nevertheless,

> . . . the differences in approach are more semantic than real. The common theme underlying decisions striking down hairstyle regulations is that the Constitution guarantees rights other than those specifically enumerated, and that the right to govern one's personal appearance is one of those guaranteed rights.
>
> *Bishop v. Colaw,* 450 F.2d 1069, 1075 (8th Cir. 1971).

Appellee respectfully submits that the decisions of lower federal courts holding that the right to style one's personal appearance is constitutionally protected are consistent with and follow from prior decisions of this Court.

Citing *Stradley v. Andersen,* 478 F.2d 188 (8th Cir. 1973), appellant disputes that the Constitution protects the

right of a police officer to style his or her personal appearance. In effect, appellant would deny appellee this right on the basis of appellee's status. *Dwen* explicitly held that one's right to regulate one's personal appearance is independent of one's status. 483 F.2d at 1130 n.9. Specifically, it refused to extend to police organizations "the unique judicial deference accorded to the military" in matters declared by the military establishment to affect the effectiveness of the performance of its military functions. *Id.* at 1128. Appellee respectfully submits that *Dwen* was correct in this respect. This Court's decision in *Garrity v. New Jersey*, 305 U.S. 493 (1967), clearly establishes that an individual does not forfeit his or her constitutional rights when he or she joins a police force.

II. Appellant has not made the factual showing necessary to justify the infringement by Section 4.18 of appellee's right to choose the length and style of his hair, sideburns, and mustache.

Appellee does not contend that an individual's right to style his or her personal appearance is absolute. To the contrary, appellee recognizes that this right may be infringed by the state upon a sufficient *factual showing* of genuine need. As stated in *Dwen v. Barry, supra*, 483 F.2d at 1130, "[l]imitation of such a right requires some showing of public need."

Dwen held that "a legitimate state interest reasonably related to the regulation" is required to justify a restriction of one's right to style one's personal appearance, *id.*, and this standard was applied by the District Court in this case. 391 F.Supp. at 645. Appellee contends that, as in *Roe v. Wade, supra*, 410 U.S. at 155, a "compelling state interest" must be shown before the right may be limited. For purposes of this motion, however, it is not necessary to determine the standard against which the interests asserted by appellant must be measured. As the District Court concluded, Section 4.18 fails to pass constitutional muster even under the less strict standard.

The District Court agreed with appellant that the three interests alleged to be furthered by Section 4.18—safety of, discipline among and public cooperation with State Policemen—are legitimate state interests. 391 F.Supp. at 645. Disagreeing with appellant, however, it held that these interests are not reasonably related to Section 4.18. *Id.* at 647. An analysis of the District Court's opinion in light of the record shows that this holding and the findings of fact upon which it is based are plainly correct and clearly not erroneous.

1. Safety.

Preliminarily, appellant argues that the District Court failed to deal with the state's interest in safety because the court found that safety had not been considered in the promulgation of Section 4.18. Appellant's Jurisdictional Statement 11-13. Appellant's argument simply misstates the District Court's opinion. True, the court found that safety factors were not considered by appellant in drafting Section 4.18. 391 F.Supp. at 645-47. Its opinion clearly reveals, however, that it reviewed each factor individually to determine whether or not the factor was reasonably related to Section 4.18 and that it found each factor not so related. *Id.* at 646-47.*

---

* After rejecting safety as a consideration in the drafting of Section 4.18, the District Court found that "the true motivation for the promulgation of Section 4.18 was a desire for uniformity of appear-

(Footnote continued on following page)

Turning first to the gas mask issue, the District Court found "that neither mustaches nor hair length interfere with the gas mask seal and that there is only a possibility that sideburns could interfere with the seal . . . ." *Id.* at 646. Furthermore, the court found that "there is no proof that the sideburn length specified in Section 4.18 bears a reasonable relationship to having a good gas mask seal." *Id.* at 646-647. This point is significant and bears elaboration. Appellant did not introduce any physical evidence showing that a seal between a mask and the wearer's face is less likely to form if the wearer has sideburns not permitted by Section 4.18 than if he has sideburns which comply with the requirements of Section 4.18.* In the absence of such evidence, the requirements of Section 4.18 are arbitrary in the sense that the line of demarcation between sideburns that are permitted and those that are not bears no relationship to whether or not a seal would form between a mask and the face of the sideburned wearer.

As to the argument that Section 4.18 is justified because a struggling opponent might grab a State Policeman's hair,

---

(Footnote continued from preceding page)

ance." 391 F.Supp. at 647. *Compare Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 653 (1974) (concurring opinion, Powell, J.):

> The records before us abound with proof that a principal purpose behind the adoption of the regulations was to keep visibly pregnant teachers out of the sight of school children. The boards do not advance this today as a legitimate objective, yet its initial primacy casts a shadow over these cases. Moreover, most of the after-the-fact rationalizations proposed by these boards are unsupported in the records.

* The only technical evidence on the gas mask issue, American National Standards Institute, Inc., "American National Standard Practices for Respiratory Protection" (August 11, 1969), appellant's Exhibit 3, suggested that *any* sideburns may prevent an effective seal. 391 F.Supp. at 647 n.8.

the District Court found that this factor was not reasonably related to Section 4.18. It stated:

> Since the key to this danger is the amount of hair available to grip, the fact that the section does not regulate length of hair on top of the head undercuts this justification. Furthermore, it would seem that hair worn at collar length could be grasped almost as easily as hair worn a little bit longer. If the state police truly considered this a safety factor, the regulation would require hair to be worn much shorter than collar length.
>
> *Id.* at 647.

In addition, it noted:

> Furthermore, an assailant could grasp the length of hair permitted by the regulation. If this was a serious factor, the regulation would only permit very short haircuts.
>
> *Id.* at 647 n.9.

In short, the District Court clearly found that Section 4.18 was neither intended nor drafted to eliminate the possibility of a struggling opponent using the State Policeman's hair to aid his struggle and that it does not in fact do so.

Finally, the District Court rejected appellant's contention that Section 4.18 is reasonably designed to prevent hair from falling over a State Policeman's eyebrows and thus interfering with his sighting of a gun. Not only did the court find this testimony to be "highly speculative", but also it observed that there were "other simpler ways to handle this problem." *Id.* at 647.

The District Court's findings of fact with respect to the foregoing clearly establish that Section 4.18 is not reasonably related to safety. Significantly, appellant has not shown in his Jurisdictional Statement that the findings are erroneous in light of the record.

2. Discipline.

With respect to this asserted justification for Section 4.18, suffice it to say, in the words of the District Court, that "[n]o testimony explained precisely how Section 4.18 accomplishes the end of discipline." *Id.* Appellant has simply not demonstrated that this ruling is erroneous.

3. Public Cooperation.

Again, the District Court found that this asserted interest had no support in the record. *Id.* Moreover, in this regard the court credited State Policeman Kleinsmith's testimony to the effect that his personal appearance encouraged public cooperation with him, although his appearance was in violation of Section 4.18. *Id.*

Appellant's argument, therefore, is deficient in two respects. Not only has he failed to demonstrate a factually sound position, but he has also failed to show that the District Court's findings are erroneous. He apparently takes the view that the mere *assertion* of the interests of safety, discipline and public cooperation is enough to justify Section 4.18. Clearly, however, this is not enough. Rather, it is well established that in order to justify an infringement of an individual's constitutional rights by the state, as in the case of Section 4.18, there must be *evidence* establishing that the challenged state action is reasonably related to a legitimate state interest. *See, e.g., Roe v. Wade, supra,* 410 U.S. at 155-56; *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 640 (1974).

In sum, standards which infringe personal liberty without reasonable justification and which appear to give rise to technical, if not punitive, citations of violation of the standards by competent and dedicated career police officers have

no place in our system of government. The District Court's action in striking down Section 4.18 was clearly correct.

III. Appellee's right to bring this action has not been waived.

Appellant contends that appellee's right to challenge the constitutionality of Section 4.18 was waived by the union which served as collective bargaining agent for State Policemen of appellee's rank while Section 4.18 was being drafted. This contention is based solely on the fact that before Section 4.18 was promulgated the president of the union sent to appellant a letter which stated that the executive committee of the union "concurs with the majority of the proposed changes." Appellant's Exhibit 10, Tr. 114-15.

The District Court held that this fact was insufficient to prove a waiver under the standard stated in *D. H. Overmyer Co. v. Frick Co., supra.* 391 F.Supp. at 644. On the record in this case, the holding is clearly correct.

First, there is no evidence that appellee personally authorized the executive committee of the union to approve Section 4.18 on his behalf. Also, there is no proof that he was consulted by the executive committee before the letter in question was sent or even that he was aware a regulation governing personal appearance was being considered by appellant and the union.

Furthermore, appellant has not shown that the executive committee of the union was empowered to waive appellee's constitutional right to style his personal appearance. No provision of the union's constitution or by-laws is cited by appellant as having given the executive committee this power either explicitly or implicitly. Moreover, contrary to appellant's assertion, the collective bargaining agreement

between the union and the State of New York which was in force when Section 4.18 was being drafted also did not do so.*

Article III of the collective bargaining agreement stated in pertinent part:

> It is understood and agreed that management possesses the sole right to conduct the State's business and to carry out its obligations and that all management rights repose in it, but that *such rights are subject to such conditions, requirements and limitations as may be applicable under law,* and must be exercised consistently with the other provisions of this Agreement. These rights include but are not limited to the following:
>
> • • •
>
> 7. To make rules, regulations and policies concerning personnel procedures and practices, subject, however, to the procedures described in Article XVI of this Agreement. (Emphasis added.)

Article XVI stated in full that "[t]he Superintendent of State Police will consult with [the union] prior to promulgation of all memoranda and changes in the Rules and Regulations of the Division affecting the terms and conditions of employment."

Under these provisions, the union had to be consulted about changes such as that made by Section 4.18, but its approval was not required before the changes could be made. More importantly, however, even after consultation

* The collective bargaining agreement, entitled "Agreement Between the State of New York and the Police Benevolent Associaition of the New York State Police, Inc. for the Unit Consisting of All Non-commissioned Officers, Investigators and Troopers of the Division of State Police, 1971-1973", was not introduced into evidence by appellant at the hearing in this case, but was made available to the District Court by his counsel.

with the union (and perhaps obtaining its approval) the Division of State Police could only make changes "subject to such conditions, requirements and limitations as may be applicable under law . . . ." In other words, rather than empowering the union to waive State Policemen's legal rights (including constitutional rights), the collective bargaining agreement itself prohibited promulgation of any rule relating to personnel which was contrary to law (including constitutional law).

Finally, even if the collective bargaining agreement empowered the union to waive appellee's constitutional right to style his personal appearance, the union did not do so on the facts of this case. The letter sent to appellant by the president of the union clearly indicates that the executive committee of the union did not approve of Section 4.18 as it was ultimately promulgated. It proposed a change in the permissible length of sideburns, a proposal rejected by appellant. Appellant's Exhibits 10, 11, 12, Tr. 114-17.

Thus, on the facts appearing in the record, the District Court was plainly correct in holding that this action is not barred on the ground that appellee's constitutional right to style his personal appearance has been waived. Appellant invites this Court to "presume acquiescence in the loss of fundamental rights." *Ohio Bell Telephone Co. v. Public Utilities Comm'n,* 301 U.S. 292, 307 (1937), quoted in *D. H. Overmyer Co. v. Frick Co., supra,* 405 U.S. at 186. The invitation should be declined.

Conclusion

The questions raised by appellant do not require this Court's plenary review, and the judgment below should be summarily affirmed. Alternatively, in light of this Court's recognition of the importance of the issues raised in this case by reason of its grant of certiorari in *Dwen v. Barry*, No. 74-1269 (certiorari granted May 27, 1975), appellee respectfully suggests that it may be appropriate for this Court to order the two cases argued together as one case pursuant to Rule 43(5) of the Rules of this Court.

Dated: August 15, 1975.

Respectfully submitted,

MICHAEL J. HUTTER,
Western New England Law School,
1215 Wilbraham Road,
Springfield, Massachusetts 01119,

CHRISTIAN G. KOELBL III,
1800 One M & T Plaza,
Buffalo, New York 14203,

Attorneys for Appellee.